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State of Utah v. Ernie Gates : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

ERNIE GATES,

Defendant and Appellant.

} Case No. 7474

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth in appellant's brief, but adds to them the following facts, believed pertinent, that are not included therein:

According to the uncontroverted testimony of Mrs. Beverly Willis, the state's primary witness, she and her aunt met the defendant for the first time in the bar room of the Labor Temple (T. 3 and 4) on 25th Street in Ogden, Utah, at about 6:30 p.m. September 29 (T. 45).

The defendant began a conversation with Mrs. Willis and invited her to a table; he offered her a job at a hotel in Bend, Oregon, where she could earn \$1500.00 per month (T. 5 and 6). Concerning this the following testimony was given on direct examination (T. 7):

“Q. Was there anything spoken in that conversation between you and the defendant in this case, regarding this \$1500.00 that he said you would be able to make? Was there anything said on how you would make it? How much you would make an evening or how much would be involved?

“A. I told him it seemed like an awful fabulous figure to me. I didn't see how a girl could make that much money in a month. He told me when you have eight or ten men in one night, it adds up. He said the Mexicans are really free with their money, especially when they have been drinking. He said when a Mexican has been drinking, you can take most of their money away from them anyway.”

The defendant then told Mrs. Willis to leave her aunt and meet him at 11:00 p.m. He wrote on the cover of a book of matches the address of a gambling place where she was to meet him, and he left (T. 7).

Mrs. Willis and her aunt then went to the police station in Ogden and told two detectives of the defendant's proposition; it was decided that Mrs. Willis should meet the defendant again so that the detectives could get proof of the defendant's activities and place him in custody (T. 8).

During the second meeting with defendant in Room 15 of the Wilcox Hotel, according to the testimony of Mrs. Willis, the defendant proceeded to explain in detail the administrative and protective practices of "the trade" (T. 11). He told her about clothes he was going to buy her, places he would take her and about other women he had working for him (T. 13). After about two hours of conversation the two detectives entered and arrested the defendant (T. 14).

STATEMENT OF POINTS

1. The crime of pandering as defined by the second clause of the Utah statute is made out without proof that the female actually became a prostitute.

2. The general remarks of the court concerning the materiality of evidence of previous unchastity were proper.

3. The court's general remark that Albert Gentile had already corroborated the other witnesses was proper.

4. Pronouncing of a sentence other than that provided in the penal code for a given crime is not reversible error.

ARGUMENT

I.

THE CRIME OF PANDERING AS DEFINED BY THE SECOND CLAUSE OF THE UTAH STATUTE IS MADE OUT WITHOUT PROOF THAT THE FEMALE ACTUALLY BECAME A PROSTITUTE.

The argument under this point is intended to answer appellant's points 1, 3, 5 and 6, for if it is not necessary that the state prove any more than that the accused had conversations with the female, trying to induce her to become a prostitute, then it was proper for the lower court to use the words "to try to induce * * *" in its instruction, overrule defendant's motion to dismiss on grounds of insufficient evidence, refuse to give requested instructions requiring proof of actual prostitution as result of the conversation, and refuse defendant's motion for a new trial on the ground that the facts proved did not constitute a public offense.

Appellant in his brief quotes only the first two clauses of Section 103-51-8, Utah Code Annotated 1943, and cites four cases to sustain his views that it is necessary to show that the defendant's solicitations and inducements brought about a changed condition, or that the woman actually became a prostitute. The whole of Section 103-51-8, Utah Code Annotated 1943, divided into seven clauses for the purpose of conveniently referring to them, is as follows:

(1) Any person who procures a female inmate for a house of prostitution;

(2) Or induces, persuades, encourages, inveigles or entices a female person to become a prostitute;

(3) Or who by promises, threats, violence, or by any device or scheme, causes, induces, persuades, encourages, takes, places, harbors, inveigles or entices a female person to become

an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed;

(4) And any person who by promises, threats or violence, or by any device or scheme, causes, induces, persuades, encourages, inveigles or entices an inmate of a house of prostitution or place of assignation to remain therein as such inmate;

(5) And any person who by promises, threats, violence, or by any device or scheme, or by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages or procures any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution, or, not being her husband, for the purpose of sexual intercourse, or to inveigle, entice, persuade, encourage or procure any female person to come into this state or to leave this state for the purpose of prostitution, or, not being her husband, for the purpose of sexual intercourse;

(6) And any person who takes or detains a female with the intent to compel her by force, threats, menace or duress to marry him or to marry any other person or to be defiled, or upon the pretense of marriage takes or detains a female person for the purpose of sexual intercourse;

(7) Or receives or gives, or agrees to receive or give, any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of pro-

stitution, or, not being her husband, for the purpose of sexual intercourse;

Is guilty of pandering, and shall be punished by imprisonment in the state prison for a term of not more than twenty years.

It will be noted that this statute covers a "multitude of sins." To "procure" a female for a house of prostitution is an offense under the statute. To "induce" a female to become a prostitute is another offense. To "induce" a female by "promises" to become an inmate of a house of prostitution is an offense, or to "induce" by "promises" any female to *remain* in a house of prostitution is a public offense. Certainly there is no requirement for change of condition there with respect to the female's status as a prostitute. If she is already a prostitute she can't "become" one, yet the statute prohibits and makes an offense the inducement of a female to *remain* in a house of prostitution. To receive, give, or even to *agree* "to receive or give any money" for "procuring or *attempting* to procure any female" to become a prostitute is an offense. (Italics added). There is no requirement that the female actually prostitute herself. A mere *agreement* to give or receive money, for a mere *attempting* to procure is sufficient.

Respondent contends that the intent of the legislature in adopting this statute was not only to prevent prostitution, but to punish those who attempt to foster it. With that thought in mind, it is easy to see a definite distinction between the first two clauses of the statute.

A successful prosecution under the first clause, "any person who *procures* a female inmate for a house of prostitution" would require proof of the female's actually becoming an inmate; but under the second clause, "or induces, persuades, encourages, inveigles or entices a female person to become a prostitute" a successful prosecution may be had without proof of the female's actually becoming a prostitute. The first clause strikes at the actual procuring, or placing of the female. The second clause strikes at the preliminary act of trying to procure the female or cause the female to become a prostitute. This difference in the meaning of the two clauses was clearly intended else why were they set out separately as grounds for prosecution? It must be noted that the prosecuting officer was careful to charge defendant under the second clause of the section.

In disposing of the cases cited and quoted by appellant on pages 6 through 8 of his brief, respondent contends that none of them is in point. The Idaho case, *State vs. Mantes*, 32 Idaho 724, 187 P. 268, turns on the defense of entrapment, which defense hasn't been raised in this case. The Oklahoma case, *Jefferson v. State*, 21 Okla. Cr. 388, 208 P. 1038, involves a statute somewhat different from ours. It contains no provision such as clause 2 of our statute under which defendant was charged. In *People v. Cook*, 96 Mich. 368, 55 N.W. 980, the females involved were already prostitutes, and the court in effect held that the statute was not directed against the solicitation of a female, who was already in a house of ill fame, to go into another house of like

character. This case therefore has no bearing on the principal case in which Mrs. Willis was not already a prostitute.

The court should find no difficulty in distinguishing *State v. Topham*, 59 Utah 58, 123 P. 888, cited and quoted by appellant, from the facts of the principal case. There the defendant was accused under clause 4 which requires "promises, threats or violence," or the use of a "device or scheme" to induce a female to *remain* in a house of prostitution. In reversing the judgment of conviction, the court held, first, that the information was not specific as to the promises made, or the schemes or devices used, second, that the evidence as to the promises was insufficient, and third, that there was no evidence at all to the effect that the defendant asked the female to remain as an inmate of the house of prostitution. In the principal case defendant was charged under clause 2, an entirely different offense; and, furthermore, there has been no attack on the sufficiency of the information.

It is respondent's contention that the purpose of the statute under which defendant was charged is to strike at the activities of panderers and pimps in trying to get females to ply the trade of prostitution. There are other statutes which strike at the evils of illicit sexual intercourse, 103-51-3 (adultery) and 103-51-5 (fornication), or operating a house of prostitution, 103-51-21, or profiting by earnings of fallen women, 103-51-10, etc. So that it seems the crime of inducing a

female to become a prostitute is made out without having to prove these other things.

In *People vs. Snyder*, 36 Cal. App. 2d 528, 97 P. 2d 976 (1940), one count involved a female taken by the defendant to a house of prostitution, but who never went to work there as a prostitute because of the results of a clinical examination. The court held that "the fact she did not work in such house as a prostitute in no way lessened the culpability of the appellant."

In *Sanders v. State* (1910), 60 Tex. Crim. 34, 129 S.W. 605, there was involved a statute similar to clause 2 of the Utah statute. In answering appellant's contention that the information should have given the name of the hotel to which the females had been taken and the names of the men with whom she had sexual intercourse, the court said:

"It will be noted that it is not the participation in the immoral conduct or the unlawful sexual intercourse that is condemned under this article, but it is the soliciting, procuring or alluring a female to visit or be at a particular house or room or place for that purpose, and, since the statute is not punishing for the unlawful sexual intercourse or immoral conduct, it becomes unnecessary to set out the name of the man or men whom the female is expected to meet. The whole offense is the alluring of the party to go to certain places for sexual intercourse and immoral conduct. They may never reach the point designated. If the female is allured or invited and she starts to the place or room of assignation, it would make the offense complete. Hence it is

not necessary to set out the names of the parties whom she was going to meet * * *

This case was cited and quoted in the similar case of *Day v. White* (1944), 70 Ga. App. 819, 29 S.E. 2d 659.

In the case of *Denman v. State* (1915), 77 Tex. Cr. 395, 179 S.W. 120, the defendant, a bellhop, solicited a female to accept "dates." He made such "dates" and she visited the rooms of certain men and had illicit sexual intercourse with them. Appellant contended that the female's testimony had to be corroborated, but the court in holding otherwise made the following distinction:

"If an act of intercourse was essential to a completion of the offense, it might well be contended that, even under such circumstances she would be such a party to the crime as to require that her testimony be corroborated before a conviction was authorized. But the statute makes it an offense to solicit and procure; even though an act of intercourse should not occur, if intervening causes should prevent the sexual intercourse. For, if appellant should solicit a woman to go with him to any place to meet a man for the purpose of engaging in carnal intercourse, he would be guilty even though the woman refused, and the fact that she consents does not make her an accomplice, for his offense was complete when he made his solicitation. The code provides (Article 498) it shall be unlawful to invite, solicit, procure, or use any means for the purpose of alluring or procuring any female to meet a man for the purpose of having sexual intercourse with him."

It appears that this court has not yet decided a case based upon the specific charge that the defendant induced, persuaded, encouraged, inveigled and enticed a female person to become a prostitute. Respondent therefore submits that the above authorities from other states are persuasive and should be followed.

Concerning the appellant's Assignment of Error No. 1 that the trial judge erroneously inserted the words "to try" in his instruction, respondent submits that such was not error because it correctly stated the law even though not in the exact language of the statute. 1 Randall's Instructions to Juries, p. 672, section 365, has the following to say about defining offenses:

"In a criminal prosecution it is not improper for the court to define the crime charged in the exact words of the statutory definition of it, and it is perhaps better that the court should do so; and it is no objection to quoting the statute that there is no evidence that the defendant has made use of all the means designated in the statute of committing the crime charged; but it is not necessary for the court to use the words of the statute in defining the offense, so long as the language which it does use has the same meaning and cannot be misconstrued by the jury."

II.

THE GENERAL REMARKS OF THE COURT CONCERNING THE MATERIALITY OF EVIDENCE OF PREVIOUS UNCHASTITY WERE PROPER.

As part of defendant's case Ernest Ketchum testified to a previous act of illicit sexual intercourse on the part of Mrs. Beverly Willis. After the state's cross-examination the court asked the witness some questions. Appellant's attorney then addressed the court on some matter concerning the clearing of the record and the court, interposing, made the following general remark:

“First, I don't know why Mr. Browning let this in, but it's immaterial. Nothing has been shown that it's material.”

Appellant contends that these remarks were prejudicial error in that they tended to materially influence the jury; and that they invaded the province of the jury as the exclusive triers of the facts. We fail to see where the judge's remarks in any way indicated his opinion as to the truth of the facts testified to, as to the credibility of the witness, or as to the weight of the evidence. He merely, of his own motion, stated the law with regard to the materiality of the evidence, which is certainly within the province and duty of the court. Concerning the court's duty in this respect, 2 Jones' Commentaries on Evidence (2nd Ed.), p. 1363, section 730, says:

“It is a familiar rule which may be implied from all the authorities, that if the evidence proposed is clearly irrelevant it should be rejected. And the judge may reject such evidence on his own motion, whether objected to or not * * *. The evidence may be withdrawn by the party who has given it, or the court may withdraw it, and positively instruct the jury to disregard it—to discard it from their view * * *.”

The judge would have been perfectly proper in later instructing the jury to disregard this testimony, and that he did not do so is, of course, no disadvantage to the appellant.

Appellant makes no argument on the question of materiality of evidence concerning Mrs. Willis' previous unchastity, and for that reason we refrain from arguing at length that previous unchastity of the female is not a defense to the crime of pandering. Suffice it to say that under our statute it is immaterial whether the female is of previous chaste character or not. Clause 4 of the statute anticipates the previous prostitution of the female, and the statute is directed against solicitation or encouragement to continue to ply the trade of prostitution.

III.

THE COURT'S GENERAL REMARK THAT ALBERT GENTILE HAD ALREADY CORROBORATED THE OTHER WITNESSES WAS PROPER.

In answer to appellant's charge that the court materially influenced the jury by stating during the cross-examination of one of appellant's witnesses that he had already corroborated the state's witnesses, respondent submits that the statement was made merely to prevent accumulative evidence against the defendant. It was made primarily as a legal ruling on the propriety of further cross-examination. Unlike the case of *State v. Greene*, 33 Utah 497, 94 P. 987, cited by appellant, no

reference was made by the court to any facts which had been the subject of the testimony. In the following quotation from 64 C.J., Trial, 102(4), p. 98, a distinction is made between comments reflecting the court's opinion as to the weight or sufficiency of the evidence and casual remarks not directed to the jury but rather concerning the scope of the cross-examination:

“It is improper for the judge presiding at a trial to indicate, by any comment or remark made in the presence and hearing of the jury, his opinion as to the weight or sufficiency of any evidence in the case, or as to what has or has not been established, or the extent of the damages for which recovery is sought, or to state that particular facts have been proved, where they are in dispute, or that there is no evidence in support of a contention, where evidence has in fact been introduced. Casual remarks, however, as to evidence, not calculated to have the effect of impressing the jury with the court's view of its weight or sufficiency, are ordinarily not fatal, even though they relate to whether a case has been made out or a prima facie showing made, or whether particular evidence would warrant submitting an issue to the jury or support a finding; and mere rulings on motions or objections which turn upon the question whether there is any proof, or sufficient proof, in the case do not constitute an improper intimation to the jury of the court's opinion as to the weight or sufficiency of the evidence. A comment referring to a disputed fact in hypothetical terms, or in a manner definitely indicating that the judge has no opinion on the question, is not objectionable as a comment on the weight or sufficiency of the evidence. A

remark that counsel have gone beyond the scope of legitimate examination or cross-examination of witnesses is not improper as a comment on the testimony elicited.”

IV.

PRONOUNCING OF A SENTENCE OTHER THAN THAT PROVIDED IN THE PENAL CODE FOR A GIVEN CRIME IS NOT REVERSIBLE ERROR.

By section 103-51-8, Utah Code Annotated 1943, the crime of pandering is made to carry a sentence of “imprisonment in the state prison for a term of not more than twenty years.” For some reason which does not appear from the record, the court below pronounced a sentence of “not less than twenty years” in the state prison.

Disregarding the propriety of such a sentence, we believe that this error does not affect the validity of the sentence. The framers of the Indeterminate Sentence Law foresaw that there might be errors in applying the new type of punishment contemplated under that law. In 105-36-20, Utah Code Annotated 1943, the legislature enacted a provision which operates to correct erroneous sentences:

“* * * Every such sentence, regardless of its form or whether it, by its terms, purports to be for a shorter or different period of time, shall, nevertheless, be construed and held to be a sentence for the term between the minimum and maximum periods of time provided by law for

the particular crime of which the person is convicted, and shall continue in full force and effect until the maximum period has been reached, unless sooner terminated or commuted as provided by law."

Thus, in every case the punishment for which is left indeterminate, the person charged with execution of the sentence may look to the statute to ascertain the sentence imposed. Only in the cases of treason and murder does the trial judge have discretion to impose a definite sentence; in the other cases the statute deprives him of power to pronounce a sentence other than the one provided by law.

Lee Lim v. Davis, 75 Utah 245, 284 P. 323, does not require a holding that the sentence is void. In that case the defendant had been convicted of second degree murder and then sentenced to an indeterminate term. Inasmuch as the statute required the trial court to exercise its discretion in such cases and fix a definite term, it was held that the imposition of an indeterminate term was void. But that is not the case here. There the error was in refusing to exercise a discretion the court was duty bound to exercise, and in imposing a sentence that was wholly unauthorized. Here the court pronounced the wrong sentence, but of the type that is automatically corrected by operation of 105-36-20, Utah Code Annotated 1943.

But even if there were error which requires the pronouncement of a different sentence, the case need not be sent back for that purpose. This court may "re-

verse, affirm or modify the judgment or order appealed from * * *.' 105-43-3, Utah Code Annotated 1943.

In *People v. Rossi*, 37 Cal. App. 778, 174 P. 916, cited by appellant, the California Court of Appeal refused to remand the case in order to have the trial court impose the correct sentence. It was there held that the sentence could be reformed by the appellate court to conform to the injunction of the statute.

CONCLUSION

A review of the law and authorities pertaining to the admission of evidence, comments by the court and elements of the crime of pandering, and a review of the record reveals that the appellant was granted a fair, legal trial, that prejudicial errors did not occur; that there was sufficient competent evidence to go to the jury and that the jury was properly instructed in accordance with law and justice.

Respectfully submitted,

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